

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION ONE**

RHODE ISLAND LFG GENCO, LLC,

Employer

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS, LOCAL 251

Petitioner

Case No. 01-RC-208704

**TEAMSTERS LOCAL 251'S RESPONSE TO
BROADROCK'S REQUEST FOR BOARD REVIEW
OF REGIONAL DIRECTOR'S SUPPLEMENTAL DECISION AND OBJECTION TO
MOTION TO STAY**

Teamsters Local 251 ("the Union") hereby submits this response to Rhode Island LFG Genco, LLC's ("the Employer") Request for Review in the above-entitled matter. As discussed in more detail below, the Hearing Officer and Regional Director properly applied this Board's decision in *PCC Structural's* and concluded that the petitioned-for unit of Maintenance Technicians ("Maintenance Techs" or "Agreed-Upon Techs") shares a community of interest sufficiently distinct from the interests of the Day Utility Technician ("Utility Tech"). Because the Regional Director did not depart from Board precedent, nor rely on erroneous facts, the Board should decline to reconsider the decision. Further, because the Employer's arguments lack merit, it should not be absolved of its obligation to bargain with the Union. The Employer's request to stay its bargaining obligation should be denied.

I. THE REGIONAL DIRECTOR'S DECISION ON SUBSTANTIAL FACTUAL ISSUES WAS NOT CLEARLY ERRONEOUS

Neither the Hearing Officer nor the Regional Director ignored evidence. The Employer had the opportunity to present evidence in support of its claims during the two-day hearing. It

produced two witnesses that lacked credibility, and little or no physical evidence in support of its assertions. Conversely, the Union presented four credible witnesses and volumes of physical evidence to support its assertion that the Utility Tech does not perform the same type of work as the Maintenance Techs. This evidence was presented despite the fact that the Employer objected to, then failed to timely produce, subpoenaed records that would support the Union's argument. Having presided over the hearing, the Hearing Officer was in the best position to determine the credibility of the witnesses. She clearly found that the Employer's witnesses were not credible, especially in light of the contradictory documentary evidence presented **including the Employer's own written job descriptions and organizational chart.** "The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect." *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). No such evidence exists here.

Notably, The Employer asserts that the Regional Director should not have considered whether the Day Utility Technician shares similarities with the Operating Technicians **but then goes on to argue that the Day Utility Technicians does not share enough similarities with the Operating Technicians.** It argues that the Regional Director's decision "would result in at least three and likely four bargaining units at the same plant of seventeen total employees, because there are far greater differences between the Day Utility Technician and the other excluded employees than between the Day Utility Technician and the petitioned-for unit." Employer's Brief at p. 4. However, there is no evidence to support its claim. On the contrary, because the Utility Tech clearly shares a community of interest with the Operating Technicians (he fills in for them, is in the same Department, shares the same supervisor, etc.), the units would *not* be fractured.

The Employer listed six categories of factual findings made by the Hearing Officer and Regional Director that it asserts are “clearly erroneous.” At noted below, the findings are supported by substantial evidence.

(i) Types of Maintenance Duties Performed

The Employer asserts that it presented “unrebutted testimony demonstrating that the Day Utility Technician engages in wide variety of complex, corrective, and preventative maintenance.” Employer’s Brief at p. 10. However, that testimony did not indicate “complex, corrective” maintenance. Further, four witnesses contested that Mr. Antignano performed “complex, corrective” maintenance and the Employer’s own records showed that Mr. Antignano performed only one so-called corrective maintenance task. Tr. 191.

(ii) Departmental Organization and Supervision

The Employer asserts that the Hearing officer and Regional Director “ignored” Glenn Lockhart’s testimony. On the contrary, the hearing officer clearly found Lockhart’s testimony lacked credibility. Lockhart’s testimony that he created the Utility Tech position to assist with a six-month backlog of maintenance was unsupported by the evidence. The employees in maintenance department testified that there was no such backlog and that they were never informed that the Utility Tech position was created to assist in that backlog. See Tr 271-272. Rather, the position was created to “help out with special projects and to assist operations.” Tr 216.

Although the Union had subpoenaed all documents relating to the organizational structure of the Employer, the Employer failed to provide a copy of the **current organizational structure that was posted in the workplace at the time of the hearing**. When the Union’s attorney presented Mr. Lockhart with the document, he admitted to creating the document but

claimed that it was never implemented: "it was just an idea. It was presented to management as an idea." Tr. 55. When asked *when* the document was created, Lockhart testified it was created in the summer of 2016, **six months before Angelo Antignano was hired as the Day Utility Technician**. Notably, the document, Union Exhibit 1, lists Mr. Antignano as the Day Ops Technician (another name for the Day Utility Technician).

Q. You created this document six months before Angelo was hired as day ops tech?

A. This is a working document to see who would fit in these positions. We didn't know.

Q. It's your testimony that you were putting Angelo's name in there and thinking that maybe six months later, he would be the ops tech?

A. You have a lot of moving pieces. It helps to put those in and see where you can balance out.

Q. Is that your testimony, what I just said?

MR. EINSIEDLER: I am going to object. He said he was not sure when he developed it, so it is speculating. And what was the question, again?

Q. Is it your testimony that you created this document six months before Angelo Antignano was hired as day ops tech?

A. That, I can't recall the day exactly, no.

Q. You created -- is it your testimony you created this document before you hired Angelo Antignano as day ops tech?

A. The document was created before Angelo was put into that position, yes.

Q. How about Ken Ferrebee, do you know when he was hired as day ops tech?

A. Around the same time.

Q. So around January of 2017?

A. Right. The document was created. Those names were not put in there back in June.

Q. When were the names put in?

A. That I know because we didn't know what we were doing then.

Q. You created the document back in June of 23 2015?

A. No, I didn't work for the company.

Q. 2016, but you didn't put the names in until later; is that your testimony?

A. That's what I believe to be correct, yes.

Q. When would you say you put the names in, after these individuals were hired as day ops techs?

A. There is not a rev date on this. I can't answer that question honestly. I really don't know.

Q. I am just asking you to think about would you have put someone's name in a position had they not been hired for that position yet?

A. Definitely posted where everybody could see it, I would never do that.

Q. So if this was posted, it would have been after the individuals were hired for these two positions?

A. That would be what I would do.

Tr. 50-58. Notably, Lockhart admitted that he did not post any of the alleged “revised” versions of the organizational chart.

Lockhart also testified that the Employer could not provide the works schedules for the operating technicians from the period January 2017 through June 2017 because “the guys that run the schedule, they take it and save it and they go the next six months and issue it.” Tr. 73.

The July 2017 through November 2017 schedule show Mr. Antignano on the operation technicians’ schedule nearly 50% of the time. UX-3. When asked “what records the company maintain[s] that would show who was filling in for the operating technicians during the period of January 2017 through June 2017,” Lockhart was unable to provide an answer. Tr. 75-76.

The Union also subpoenaed documents showing the employees’ wage rates. The Employer provided a document that omitted the wage rates of the control room operators. Angelo Antignano had been certified as a control room operator. See UX-2. The Employer subsequently objected to providing the wage rates of the control room operators, claiming they were not relevant. However, UX-4 shows that Mr. Antignano’s wage rate is comparable to those that of the control room operator.

The Employer also failed to produce the written job description for the operating technician, although Lockhart claimed that the Employer had position descriptions for each position. However, **it produced a job description for an operator/utility technician that was identical to the position description for the day utility technician.** Tr. 103.

When asked why the position description for the day utility technician was changed to operator/utility technician in April, 2017 (as indicated UX-5), Lockhart testified that the dates listed on the Employer’s documents were not accurate.

Q At some point, somebody came up with the term operatory/utility technician because it is on the documents that you provided to me. You don't know who came up with that?

A No. I don't want to speculate. I know we have been playing with names and it was to be made very clear that we had a day job, we had a shift job and all the functions that went underneath them.

Tr. 99-100.

Finally, Lockhart agreed that Antignano does not attend the morning maintenance meeting with the maintenance technicians where maintenance work is assigned.

Q. It is fair to say the maintenance supervisor assigns maintenance work to the three maintenance techs at the 7 a.m. maintenance meeting?

A. Yes.

Tr. 87.

(iii) Work areas.

The un rebutted testimony is that the three maintenance techs share an office and all three techs have keys to the office. Tr. 227. Antignano has his own desk in another area of the basement and no key to the maintenance office.

(iv) Primary Duties of Operating Technicians.

The Employer asserts that the "Utility Technician's primary job duty – indeed, the very reason the position was created – is to perform maintenance of faulty equipment." Employer's Brief at p. 17. As noted above, the only evidence in support of that contention was the self-serving testimony of Lockhart. The overwhelming evidence shows that the Utility Tech position was created *after* the elimination of three operating technician positions *to fill-in for* absent operating technicians. And that is exactly what occurred. Antignano *routinely* filled in for Operating Technicians. When he was not filling-in, he was doing research or performing preventative maintenance **just like the Operating Technicians.** Consequently, the Utility

Technician's work is clearly more similar to the Operating Technicians than to the Maintenance Technicians who perform complex, corrective maintenance.

(v) Limited Filling in for Operating Technicians.

The Employer admit that Antignano filled in as an Operating Technician for two whole months. Brief at p. 19. However, it claims that this "was a temporary response to an urgent need caused by length medical absence of two of the Operating Technicians." Id. As noted above, the Employer failed to maintain records that would enable the Union to show that Mr. Antignano filled in for Operating Technicians earlier in the year as well. The payroll records, however, show that Mr. Antignano worked numerous twelve hour days (the shift schedule for operating technicians) during the relevant period. And testimony from the other witnesses was that Antignano filled in routinely for operating technicians during vacations and sick leave. In fact, the Employer stipulated that Antignano "has filled in over the course of the year for the job." Tr. 76. Notably, no maintenance technician had ever filled in for an operating technician. Tr. 68.

(vi) Interaction with Agreed-Upon Technicians.

Again, although the Employer argues that the Utility Tech should not be compared to the Operating Technician, it argues that the "Operating Technicians ... work on a separate floor of the facility." Brief at p. 20. That is correct. So, when Antignano fills in as an Operating Technician, he works "on a separate floor of the facility" than Maintenance Techs. Further, Nick Accinno testified that maintenance techs perform 60-70 % of their work in the GCC building. **It was undisputed that Antignano rarely goes into that building.** Tr. 229-230.

II. THE PETITIONED-FOR UNIT WOULD NOT RESULT IN A FRACTURED BARGAINING UNIT

Although the Employer asserts that it was error for the Regional Director to note the existence of a different job classification (the Operating Technicians) that shares similarities with

the Day Utility Technician, it also argues that the Director failed to address that “the certification will result in a fractured bargaining unit.” Employer’s Brief at p. 3. However, the Regional Director clearly addressed that issue when he concluded, “[the Day Utility Technician’s] terms and conditions of employment are sufficiently distinct from those of the employees that the parties agreed to include to warrant his inclusion in a separate grouping of the Employer’s employees; **those the parties agreed to exclude rather than with those the parties agreed to include.**” Decision at p. 10.

The Employer asserts that the unit *must* be fractured since the Union filed an unfair labor practice charge four days after the Regional Director affirmed the Hearing Officer’s decision. First, the charge is not part of the record and should not be considered by the Board in its determination. But, to the extent the Board would like to consider the charge, it should have the whole story. It was not until *after* the election that the Employer started taking work *away from* the maintenance technicians and assigning the work to the Day Utility Technician. The work had never been performed by the Utility Tech before and was clearly done in retribution for the employees voting to unionize. There is no arbitrary line between what the maintenance workers do and the utility technician does. The Maintenance Techs perform complex, skilled maintenance. The Utility Tech fills in for Operating Technicians, performs research and serves as a liaison to for outside contractors. The Employer’s attempt to confuse the issue by listing hypothetical questions regarding the scope of the bargaining unit should be ignored by this Board.¹

¹ It may be that the Employer hired another Maintenance Tech. and is simply mischaracterizing the employee as a Utility Tech. to keep him out of the bargaining unit. If that is the case, there issue will be addressed during the unfair labor practice proceedings.

III. THE REGIONAL DIRECTOR PROPERLY APPLIED THE COMMUNITY OF INTEREST TEST AS CLARIFIED IN *PCC STRUCTURALS*

As noted above, the Regional Director's recognition that the Day Utility Technician has more in common with the Operating Technicians (that the Employer agreed to exclude) than with the Maintenance Technicians is proper. The "meager difference" the Regional Director relied upon in his decision are actually substantial differences. The documentary evidence alone supports the Regional Director's conclusion that the Utility Tech works in an entirely different department, has a different supervisor, and performs different work than the Maintenance Technicians.

1. Mr. Antignano is in a separate department from the Maintenance Techs.

According to the Employer's own documents, the three employees in the petitioned-for unit, Walter Accinno, Nicholas Accinno and Greg Grafton, are in Department 0400. See EX-3. Mr. Antignano, however, is in Department 0900, along with the other Operation Technicians. In addition, Mr. Antignano's position description shows that he is part of the "Operations" Team, EX-4, while Sr. Mechanical Technician reports to the "Maintenance/Safety Manager." EX-5.

2. Mr. Antignano routinely fills in for Operation Technicians. The *Broadrock Ops Schedule* provided by the Employer shows that Mr. Antignano has acted as, and has been scheduled to act as, an Operations Technician weekly since at least September 1, 2017. UX-3. Mr. Antignano is identified as "AA" on the schedule. As noted above, because the Employer did not produce the *Ops Schedule* for any period *other than* July through November, 2017, there was no evidence to contradict testimony that Mr. Antignano routinely filled-in for Operation Techs through the year. Finally, the Employer stipulated that Antignano "has filled in over the course of the year for the job." Tr. 76.

3. **Mr. Antignano has a different supervisor than the Maintenance Techs.** The Employer's Operations Chart shows that the Maintenance Techs are supervised by Ray Dupointe, the Maintenance/Safety Manager. See UX-1. Conversely, Mr. Antignano's supervisor is Dave Marcheterre, the Ops/Environmental Manager.

4. **Mr. Antignano performs different job functions and duties than the Maintenance Techs.** A comparison of the position description of the Day Utility Technician with the Sr. Mechanical Technician (a maintenance tech) indicates that the job functions and duties of the two positions differ. For example, the essential duties and responsibilities of the maintenance techs include welding, pipefitting, rebuilding of small pumps, installing bearings, vibration analysis, and coupling alignment/Laser alignment. See EX-5. Mr. Antignano performs none of these duties. See EX-4.

Conclusion

Even a cursory review of the record reveals substantial evidence in support of the Regional Director's finding that the Utility Tech does not share a community of interest with the Maintenance Techs. The Employer's own documents support the decision. The Employer's attempt to provide testimony contradicting its own documents was a failure. As the Employer cannot satisfy the grounds for review in 29 C.F.R. § 102.67(d), its Request for Review must be denied.

In the event the Board grants review, however, it should decline to issue a stay. The Employer has not satisfied the extraordinary burden of proving it will suffer some irreparable by having to meet and confer with its employees' bargaining agent. On the contrary, given the tumultuous relationship between the parties at present, requiring the parties to bargain in good faith with each other would likely have a positive effect on the relationship.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that I e-filed this document through the Agency's website, e-mailed a copy to Charles Einseidler Jr, at ceinseidler@pierceatwood.com and filed a copy with the Regional Director on the 3rd day of May, 2018.

/s/ Jessica Marsh